



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 497 OF 2015

JANE KIBIRU.....1ST CLAIMANT

JUPINARIES WAMBUA KIMULI.....2ND CLAIMANT

VERSUS

M.A CONSULTING GROUP LTD.....RESPONDENT

JUDGMENT

Introduction

1. This dispute arises from a gratuity clause contained in the Claimants' employment contracts. The Claimants' claim is contained in a Memorandum of Claim dated 26th March 2015 and filed in court on 27th March 2015.
2. The Respondent filed a Memorandum in Reply, Counterclaim and Set-off on 30th April 2015 to which the Claimants responded on 24th June 2015.
3. By consent of the parties, the matter proceeded by way of written submissions.

The Claimants' Case

4. The 1st Claimant, Jane Kibiru states that she was employed by the Respondent on a three-year contract running from 31st January 2012 until 9th January 2015. Her contract was renewed on 30th January 2015.
5. The 1st Claimant avers that her contract provided for gratuity of 25% of annual gross salary per year to be paid at the end of the three-year contract period.
6. The 2nd Claimant, Jupinaries Wambua Kimuli states that he was employed by the Respondent on permanent terms in August 2009. His letter of employment was signed on 17th May 2012.
7. The 2nd Claimant claims that his letter of employment provided for gratuity of 25% of annual gross salary per year to be paid at the end of every three years, with the first term running from 1st January 2012 to 31st December 2014
8. The Claimants state that upon expiry of their contract periods, they requested for payment of gratuity via their respective letters dated 14th January 2015 and 16th January 2015.
9. In response, the Respondent wrote to the Claimants on 26th January 2015 acknowledging the offer of gratuity while stating that there was an error in the relevant clauses in the letters of offer. The Respondent stated that the applicable clause should have read as follows:

“A gratuity of 25% of average annual gross salary will be paid at the end of every three years.”

10. The Respondent went ahead to compute the Claimants' gratuity based on the aforesaid revision. The Claimants were informed that due to the Respondent's financial position, the gratuity as tabulated, would be paid in three instalments in January 2015, December 2015 and June 2016.

11. On 6th March 2015, the Claimants were informed that if they were agreeable to the gratuity offered vide the Respondent's letter dated 26th January 2015, the Company would pay the amount in one instalment, rather than the three instalments indicated in the letter

12. The Claimants gave their response which was sent to the Respondent's Managing Director in form of a memo dated 6th March 2015. In his response, the Managing Director made remarks withdrawing gratuity to the Claimants' detriment.

13. The Claimants' now claim the following:

a) An order for payment of gratuity as follows:

i) 1st Claimant: Kshs. 1,852,011

ii) 2nd Claimant: Kshs. 348,426

b) Compensation

c) Costs plus interest

The Respondent's Case

14. In its Reply dated 30th April 2015 and filed in court on even date, the Respondent states that when it entered into contract with the Claimants the issue of gratuity was not a pre-condition of employment. The Respondent terms it as a retention of employment incentive.

15. The Respondent further states that it informed the Claimants and other employees that there was an error in the calculation of the gratuity. This was communicated to the Claimants during a meeting with the Respondent.

16. The Respondent adds that by its letter dated 26th January 2015, it explained to the Claimants that gratuity ought to be calculated on the basis of average annual gross salary, payable at the end of the three year contracts.

17. The Respondent states that it is willing to pay the 2nd Claimant gratuity of 25% of average annual gross salary in two instalments.

18. The Respondent denies that its Managing Director made any remarks withdrawing the Claimants' gratuity.

19. By way of counterclaim, the Respondent claims the sum of Kshs. 10,972,289 from the 1st Claimant being loss occasioned by her professional negligence. The Respondent asks that any gratuity payable to the 1st Claimant be set-off against this counterclaim.

Findings and Determination

20. There are two issues for determination in this case:

a) The applicable formula in tabulating the Claimants' gratuity;

b) Whether the Respondent has made out a proper counterclaim against the 1st Claimant.

Gratuity

21. It is not in contest that by the terms of their respective employment contracts, the 1st and 2nd Claimants were entitled to gratuity. The 1st Claimant's letter of offer dated 31st January 2012 provided as follows:

“A gratuity of 25% (Twenty Five per cent) of annual gross salary per year will be paid at the end of the three Year Contract period. No gratuity will be paid if this contract is terminated by either side, before its expiry i.e. before 9th January, 2015.”

22. In similar fashion, the 2nd Claimant's letter of employment dated 17th May 2012 provided as follows:

“A gratuity of 25% (Twenty Five per cent) of annual gross salary per year will be paid at the end of the (sic) every three years (i.e. first three years running from 1st January 2012 to 31st December 2014). No gratuity will be paid if this agreement is terminated by either side, before 31st December 2014.”

23. The point of contention arises from the Respondent's letters to the Claimants dated 26th January 2015. The two identical letters state:

“Gratuity 2012-2014

I have seen your application for Gratuity and respond as follows:

The offer of gratuity stands. However, there was very regrettably an error in the Letter of Offer where the applicable sentence should have read "A gratuity of 25% of the **average** annual gross salary will be paid at the end of every three years." Therefore your Gratuity is now computed in the attached sheet.

The due Gratuity will be paid to you in full. However, due to the current financial position of the company, the payment can only be made in instalments as indicated in the attached sheet.

If you are agreeable to the foregoing, a voucher will be prepared for settlement of the first instalment.

Please note that the company has reconsidered the issue of Gratuity and this will now not be paid in future. Other forms of compensation and reward for work well done will be worked out.

Yours Sincerely,

M.A. Consulting Group

(Signed)

Ngure Mwaniki

Managing Director."

24. Accompanying these letters were tabulations of gratuity in the sum of Kshs.617,011 in favour of the 1st Claimant and Kshs. 116,142 in favour of the 2nd Claimant. The Claimants objected to the revision of their gratuity clause and the accompanying tabulation by letter and memo dated 3rd February 2015.

25. The question before the Court is whether the Respondent's move to revise the provision on gratuity was lawful. In the written submissions filed on behalf of the Claimants on 17th April 2019, reference was made to the decision in *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Limited (Civil Appeal No 95 of 1999)* where the Court of Appeal stated thus:

" A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved."

26. This basic legal principle applies with equal force in commercial and employment contracts. With particular reference to employment contracts,

Sections 10(5) and 13(1) of the Employment Act outlaw unilateral variation of terms of employment by an employer. Indeed, my brother **Radido J** in *James Ang'awa Atanda and 10 others v Judicial Service Commission [2017] eKLR* termed such a move as an unfair labour practice as contemplated under Article 41(1) of the Constitution of Kenya, 2010.

27. From the evidence on record, the Respondent notified the Claimants of the variation of the gratuity clause in response to their request for payment of gratuity. By this time, the Claimants had served their respective terms and earned gratuity as provided in their letters of offer. The Court therefore did not see any legal basis for the Respondent's attempt to interfere with the Claimants' accrued gratuity. No coercion, fraud or undue influence was pleaded, much less proved.

28. For the foregoing reasons, the Court finds and holds that the Claimants are entitled to full gratuity as set out in their respective letters of offer.

The Respondent's Counterclaim

29. The Respondent makes a counterclaim against the 1st Claimant in the sum Kshs.10,972,289 being loss occasioned by her professional negligence. In my understanding, this claim falls within the realm of special damages. In *Godfrey Julius Ndumba Mbogori & another v Nairobi City County [2018] eKLR* the Court of Appeal reiterated the well settled principle that a claim for special damages must be specifically pleaded and proved with a degree of certainty and particularity.

30. The parties themselves chose not to call *viva voce* evidence. Reading their written submissions however, gave the impression of Counsel testifying for their clients. This was a futile exercise and an unnecessary burden to the Court. What is clear is that the Respondent did not bother to provide particulars of its counterclaim nor did it lead evidence to link the 1st Claimant with the alleged loss.

31. The Respondent's counterclaim against the 1st Claimant therefore fails and is dismissed.

Final Orders

32. In the ultimate I make the following orders:

(a) The Respondent is directed to tabulate and pay to the 1st and 2nd Claimants their earned gratuity in accordance with their respective letters of offer, within the next thirty (30) days from the date of this judgment;

(b) After the lapse of the said 30 days any unpaid outstanding gratuity will attract interest at court rates until payment in full;

(c) The Respondent will pay the costs of this case.

33. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 16TH DAY OF JULY 2019

LINNET NDOLO

JUDGE

DELIVERED AT NAIROBI THIS 26TH DAY OF JULY 2019

MAUREEN ONYANGO

JUDGE

Appearance:

Mr. Chigiti for the Claimants

Mr. Kigata for the Respondent